

IN THE MISSOURI SUPREME COURT

Case Number SC86300

STATE EX REL. DENIS TATE AND DOROTHY TATE,

RELATORS,

V.

THE HONORABLE JAMES A. FRANKLIN,

RESPONDENT.

ORIGINAL PROCEEDING FOR WRIT OF MANDAMUS

RESPONDENT'S BRIEF
FILED BY THE ESTATE OF HERBERT W. WILLIS
BY ELAINE GILLEY, EXECUTOR

**TAYLOR, STAFFORD, CLITHERO,
FITZGERALD & HARRIS, LLP**

Kevin M. FitzGerald
MO Bar No. 35218

3315 E. Ridgeview - Suite 1000
Springfield, MO 65804
Telephone: 417/887-2020
Fax: 417/887-8431

TABLE OF CONTENTS

Table of Contents	i
Table of Authority	iii
Argument	
I. The St. Louis County Circuit Court Correctly Sustained Bette Willis's Motion to Dismiss as Relators' First Amended Petition Did Not Allege Facts Supporting a Claim Against Her and The Second Amended Petition Proffered by Relators Added No Additional Facts Upon Which Relief Could Have Been Granted	1
II. The St. Louis County Circuit Court Properly Granted Bette Willis's Motion to Transfer as Bette Willis Was Pretensively Joined in the Lawsuit for the Sole Purpose of Creating Venue in St. Louis County	7

III.	Bette Willis’s Motion to Transfer Venue Was Properly Granted After the St. Louis County Circuit Court Dismissed Relators’ Petition Against Bette Willis	10
IV.	A Writ of Mandamus is a Drastic Remedy and Should Not Be Issued Under These Facts	12
	Certificate of Service	13
	Certificate of Virus-Free Disk	14
	Rule 84.06(c) Certification	14
	Appendix	15

TABLE OF AUTHORITY

Cases

<i>Cady v. Hartford Acc. and Ind. Co.</i>	3
439 S.W. 2d 483 (Mo. 1969)	
<i>Gibson v. Brewer</i>	3
952 S.W.2d 239 (Mo. banc 1997)	
<i>Love v. St. Louis City Board of Education</i>	2
963 S.W.2d 364 (Mo.App.E.D. 1998)	
<i>Pulitzer Pub. Co. v. Transit Cas. Co.</i>	3
43 S.W.3d 293 (Mo. banc 2001)	
<i>State ex rel. Dillon Co. v. Vogel</i>	12
945 S.W.2d 625 (Mo.App.E.D. 1997)	

State ex rel. Doe Run Resources Corp. v. Neill 7, 9

128 S.W. 3d 502 (Mo. banc 2004)

State ex rel. Jackson County Library District v. Taylor 2

396 S.W.2d 623 (Mo. banc 1965)

State ex rel. Kelley v. Mitchell 12

595 S.W.2d 261 (Mo. banc 1980)

State ex rel. Malone v. Mummert 7

889 S.W.2d 822 (Mo. banc 1994)

State ex rel. McDonald's Corp. v. Bryant 11

151 S.W.3d 101 (Mo.App.E.D. 2004)

Stover v. Patrick 4, 9

459 S.W.2d 393 (Mo. banc 1970)

Rules

M.R.C.P. 51.045 10, 11

ARGUMENT

I.

The St. Louis County Circuit Court Correctly Sustained Betty Willis's Motion to Dismiss as Relators' First Amended Petition Did Not Allege Facts Supporting a Claim Against Her and the Second Amended Petition Proffered by Relators Added No Additional Facts Upon Which Relief Could Have Been

Granted_____

Cady v. Hartford Acc. and Ind. Co., 439 S.W. 2d 483 (Mo. 1969)

Stover v. Patrick, 459 S.W.2d 393 (Mo. banc 1970)

Love v. St. Louis City Board of Education, 963 S.W.2d 364 (Mo.App.E.D. 1998)

This case centers around injuries allegedly sustained by Relators in a motor vehicle accident occurring in Laclede County, Missouri on November 28, 2002, between a vehicle operated by Denis Tate and a vehicle operated by Herbert Willis. (Pars. 4, 5, Writ). Bette Willis was Herbert's wife and was a passenger in the vehicle he was operating. (Par. 5, Writ). Dorothy Tate is the wife of Denis Tate and she was a passenger in the vehicle he

operated. The Tates allege personal injury as a result of the accident. Herbert Willis died as a result of injuries sustained in the accident.

An estate was opened for Herbert Willis in Camden County, Missouri, and Elaine Gilley was appointed as the personal representative. Relators are residents of Christian County, Missouri. (Par. 1, First Amended Petition). Relators filed a lawsuit in St. Louis County naming Herbert's estate, through the personal representative, and Bette Willis as defendants. As the accident occurred in Laclede County, the estate is in Camden County and Relators in Christian County, the only connection of any nature to St. Louis County is Bette. Bette was represented in the St. Louis County action by the same attorneys who represented the defendant estate. Bette filed a Motion to Dismiss the petition and alleged that she was pretensively joined in order to create jurisdiction in St. Louis County. Along with her Motion to Dismiss, Bette also filed a Motion to Transfer Venue. The St. Louis County Circuit Court sustained Bette's Motion to Dismiss and also transferred the case to Laclede County.

In order to determine whether Relators state a cause of action against Bette, it is necessary to turn to Relators' pending petition, currently the First Amended Petition. When looking at the allegations of the pending petition, Missouri Rule of Civil Procedure 55.05 must be kept in mind. It requires that a pleading contain a short and plain statement of facts. "Mere conclusions of a pleader not supported by factual allegations cannot be taken as true, and therefore, must be disregarded in determining whether the petition states a claim upon which relief can be granted." *Love v. St. Louis City Board of Education*, 963

S.W.2d 364, 365 (Mo.App.E.D.1998). See also *State ex rel. Jackson County Library District v. Taylor*, 396 S.W.2d 623, 624 (Mo.banc 1965), wherein this court noted that it would eliminate from consideration conclusions of law and matters not well pleaded for the purposes of considering a motion for judgment on the pleadings.

With the above in mind, and turning now to the specific allegation of Relators' First Amended Petition, and as said allegations concern Bette Willis, the following are found:

10. At such time, Defendant Herbert W. Willis was operating a motor vehicle jointly owned by him and his wife Bette Willis in a northbound direction on Missouri Highway 5 in Laclede County, Missouri.

11. At such time, co-owner and Defendant Bette Willis was a passenger in the vehicle driven by Defendant Herbert W. Willis.

14. At the time of the foregoing motor vehicle crash, Defendant Bette Willis was benefitting directly or indirectly from the operation of the motor vehicle by Herbert W. Willis at that time.

15. At the time of the foregoing motor vehicle crash, Herbert Willis was acting as the agent, servant or employee of Defendant Bette Willis.

16. Accordingly, defendant Bette Willis is vicariously liable for the above-described negligent acts of Herbert W. Willis.

The "factual" allegations from the above pleading consists only of paragraph 10 (joint ownership) and paragraph 11 (Bette was a passenger in the vehicle). All remaining

allegations of the amended petition are devoid of facts and are simply conclusory statements or allegations. Certainly ultimate facts or conclusory allegations can be pled, but to survive a Motion to Dismiss they must be supported by factual allegations. *Cady v. Hartford Acc. and Ind. Co.*, 439 S.W.2d 483, 485-86 (Mo. 1969); *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. banc 1997); *Pulitzer Pub. v. Transit Cas. Co.*, 43 S.W.3d 293, 302 (Mo. banc 2001). The allegations of fact found in Relators' First Amended Petition reflect only that Bette Willis was the alleged co-owner of a vehicle with her late husband and was a passenger in that vehicle operated by her late husband at the time of the accident at issue. (Pars. 10 & 11). It has long been the law in Missouri that joint ownership of an automobile is not a sufficient basis for imputing the negligence of the driver spouse to the passenger spouse. *Stover v. Patrick*, 459 S.W.2d 393 (Mo. banc 1970). There are no other facts from which it can be determined how Bette was benefitting from Herbert's operation of the vehicle (par. 14); how or why Herbert was Bette's agent, servant or employee (par. 15); or how Bette could be vicariously liable for Herbert's alleged negligence. (par. 16).

Moreover, although completely omitted in Relators' argument, there is the additional fact that Relators, through their attorney, in a letter to the St. Louis County Circuit Judge filed in opposition to Bette's motions, readily admit that they do not have any facts to support any allegations against Bette Willis. (June 14, 2004, letter from Robert D. Curran to the Honorable Barbara Wallace, Exhibit 5 to Relators' Petition for Writ). In that letter, Relators specifically state the following, at page 5:

“...The “agent, servant or employee” language is **necessarily broad precisely**

because of [relator's] lack of actual knowledge of the exact situation

here. Without any opportunity to conduct discovery in this matter, we obviously have no way of knowing at this juncture what conversations there were between Mrs. Willis and her now-deceased husband about this trip, such as: what their destination was, why they were going there, whether the trip was made at the request of Mrs. Willis.” [Emphasis added].

Relators, by their own admission, filed their First Amended Petition against Bette without having any evidentiary support for their allegations against her. Relators, by their own admission, have no facts pled in their First Amended Petition because they are unaware of any facts. Relators cannot now be heard to argue that they have pled sufficient facts after representing to the court that they are aware of any such facts.

Relators then complain that they did not have the opportunity to file their Second Amended Petition. It is argued that the Second Amended Petition would have cleared up the issues and pled facts. The Second Amended Petition was submitted to the court so we do have the benefit of knowing its terms. The Second Amended Petition does nothing to add to the “factual” allegations as it contains virtually the same allegations as contained in the First Amended Petition as quoted above and adds the following:

14. At the time of the foregoing motor vehicle crash, Herbert W. Willis performed his actions in operating the motor vehicle according to an express or implied agreement with Defendant Bette Willis which directly or indirectly benefitted her and served her business or

interests.

15. At the time of the foregoing motor vehicle crash, Defendant Bette Willis either controlled or had the right to control the physical conduct of Herbert W. Willis.

There are no factual allegation associated with the terms of the alleged agreement between Bette Willis and her ex-husband. There are no allegations accompanying paragraph 15 and explaining how Bette controlled or had the right to control the physical conduct of Herbert Willis, who was an owner and operator of the vehicle. Again, plaintiff alleges nothing but unsupported conclusions.

The St. Louis County Circuit Court properly ruled in favor of Bette Willis in sustaining her Motion to Dismiss.

II.

The St. Louis County Circuit Court Properly Granted Bette Willis's Motion to Transfer as Bette Willis Was Pretensively Joined in the Lawsuit for the Sole Purpose of Creating Venue in St. Louis County

State ex rel. Malone v. Mummert, 889 S.W.2d 822 (Mo. banc 1994)

State ex rel. Doe Run Resources Corp. v. Neill, 128 S.W. 3d 502 (Mo. banc 2004)

This court, in *State ex rel. Malone v. Mummert*, 889 S.W.2d 822 (Mo.banc 1994), addressed the issue of pretensive joinder noting that a mere honest belief, based on the law and evidence, that a justiciable claim exists against the party joined is not enough. Instead, the test for pretensive joinder is objective and requires a realistic belief based on the law and the evidence that a valid claim exists. *State ex rel. Malone v. Mummert, supra*, @ 824. There are two possible avenues open for attacking joinder on the ground that it is pretensive, the first being an assertion that the facts pleaded in the petition are not true and

the second being that the facts, as pled and even if true, do not support a valid claim based on substantive law. *State ex rel. Malone v. Mummert, supra*, @ 825. It is not necessary to show both avenues and “[j]oinder is pretensive if either test is satisfied.” *State ex rel. Doe Run Resources v. Neill*, 128 S.W.3d 502, 504 (Mo. banc 2004). As stated in *State ex rel. Doe Run Resources Corp. v. Neill, supra*, at 505:

“The standard for determining if a petition states a claim against a defendant for venue purposes is whether, after reasonable legal inquiry under the circumstances, the plaintiffs state a claim under existing law or under a non-frivolous argument for the extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law. [Citation omitted]. Although this standard is less stringent than for granting a motion for summary judgment or sustaining a motion to dismiss on the merits, the petition still must be ‘liberally construed’ in favor of the plaintiff.”

In this case, the St. Louis County Circuit Court made reasonable legal inquiry under the circumstances and into the facts pled by Relators. Briefs were filed. Argument was orally presented. (Court Order, June 2, 2004). The court had available to it Relators’ June 14, 2004, letter wherein they readily admit their “...lack of actual knowledge of the exact situation here.” (June 14, 2004, letter from Robert D. Curran to the Honorable Barbara Wallace, Exhibit 5 to Relator’s Petition for Writ). The court then dismissed Relators’ petition against Bette Willis. That ruling was and is correct. Relator’s First Amended

Petition did not state a claim under existing law and as noted in the previous argument herein. There has been no suggestion that Relators are trying to extend, modify or reverse existing law or establish new law. As the Motion to Dismiss was properly ruled, the standard associated with pretensive joinder has certainly been met. The alleged “facts” are minimal as pled in Plaintiffs’ First Amended Petition (or as proposed in the Second Amended Petition) and all remaining allegations are mere conclusions of law. Assuming the alleged “facts” to be true, we are left only with allegations that Bette was a passenger in a vehicle she co-owned with her late husband and while he was operating it they were involved in an accident. As noted in the preceding section of this argument, this is simply an insufficient basis to impute negligence to Bette on any basis. *Stover v. Patrick, supra*.

In Relators’ brief they suggest their petition met the “less stringent” standard imposed by the *State ex rel. Doe Run Resources Corp. v. Neill, supra*, decision. As with Relators’ Amended Petition, the brief is void of any facts which support this conclusory statement.

The St. Louis Circuit Court properly granted Bette’s Motion to Dismiss as Relators’ First Amended Petition and proposed Second Amended Petition fail to state a claim against Bette. As the First Amended Petition, on its face, failed to state a claim, venue was pretensive under the first of the two tests for pretensive joinder.

III.

**Bette Willis's Motion to Transfer Venue was Properly Granted After the St. Louis
County Circuit Court Dismissed Relators' Petition Against Bette Willis**

M.R.C.P. 51.045

State ex rel. McDonald's Corp. v. Bryant, 151 S.W.3d 101 (Mo.App.E.D. 2004)

Relators argue that the Motion to Transfer Venue filed by Bette was improperly granted as the court lacked jurisdiction to rule it once it sustained Bette's Motion to Dismiss. The basis of the argument is an assumption that the co-defendant estate must file its own motion for transfer. Both the estate and Bette were being represented in St. Louis by the same attorney. The court orders and records of proceedings from the St. Louis Circuit Court attached to Relators' Writ clearly reflect that all parties were present for all

arguments on the Motion to Dismiss and the Motion for Transfer. (Court Order, June 4, 2004). There is no indication that when defense counsel appeared, he appeared only for Bette and certainly he would have appeared for all his clients. (Court Order, June 4, 2004).

Missouri Rule of Civil Procedure 51.045, as in effect at the time, provided that any party opposing a Motion to Transfer “may” file a reply denying the allegations in the Motion to Transfer. [M.R.C.P. 51.045(b)]. The rule goes on to provide that if a reply is filed the court determines the issues and if no reply is filed a transfer of venue “shall” be ordered to a court where venue is proper. [M.R.C.P. 51.045(b)]. In this case, the estate, as a defendant, did not oppose, but in fact agreed with, Bette’s Motion to Transfer. There was no reason for it to file a reply. By not replying, the estate was, in essence, joining in the motion. Certainly it is logical to suggest that, with the same attorneys representing both the estate and Bette, the estate had joined in the motion by not filing a reply because it was thereby admitting to the allegations of Bette’s motion. *State ex rel. McDonald’s Corp. v. Bryant*, 151 S.W.3d 101, 103 (Mo.App.E.D. 2004). There was no reason for the same attorney representing both defendants to file yet another Motion to Transfer when one with which both of his clients agreed was already pending.

The defendant estate did not have the opportunity to file a separate motion after the Motion to Dismiss was ruled as, even if it believed it was necessary to do so, the court had already sustained Bette’s Motion for Transfer. Under the current rule, the court may extend the time to file a Motion to Transfer Venue. [M.R.C.P. 51.045(a)]. Taking Relators’ argument to its logical end, and assuming this Court decides this case on the sole basis that

the estate did not file its own Motion for Transfer, the anomalous result is that the estate will then request the St. Louis County Circuit Court to extend the time to file its Motion to Transfer Venue for the reason that it did not have the opportunity to do so once the Motion to Dismiss was sustained. The same result would be expected and this case would be right back in Laclede County. Assuming, but not admitting, that the defendant estate should have filed its own motion, to decide the issue solely on this argument promoted by Relators does nothing to promote judicial economy and places form over substance.

IV.

A Writ of Mandamus is a Drastic Remedy and Should Not Be Issued Under These Facts

State ex rel. Kelley v. Mitchell, 595 S.W.2d 261 (Mo. banc 1980)

State ex rel. Dillon Co. v. Vogel, 945 S.W.2d 625 (Mo.App.E.D. 1997)

“There is no remedy that a court can provide that is more drastic, no exercise of raw judicial power that is more awesome, than that available through the extraordinary writ of mandamus.” *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266 (Mo.banc 1980). In order to obtain a writ of mandamus, Relators must show that they possess a clear and unequivocal right to the remedy. *State ex rel. C. C. Dillon Co. v. Vogel*, 945 S.W.2d 625, 626 (Mo.App.E.D.1997). The concern of this court is not the reason the St. Louis County

Circuit Court entered its order, but whether or not that court reached a correct result. *State ex rel. C. C. Dillon Co. v. Vogel, supra*, @ 626. For all reasons set forth in the previous arguments, it is clear that the St. Louis County Circuit Court made the proper decision. Relators readily admit that they were unaware of any facts relating to Bette, thus they could not plead facts. They pled only conclusions of law. The conclusions are unsupported and thus must be ignored when considering whether the petition states a cause of action. The Motion to Dismiss was properly sustained. As the petition was dismissed because it failed to state a claim against Bette the first test associated with pretensive joinder has been met. There is no basis to and no reason for this court to exercise the awesome power of issuance of an extraordinary writ.

Respectfully submitted,

**TAYLOR, STAFFORD, CLITHERO,
FITZGERALD & HARRIS LLP**

By _____
Kevin M. FitzGerald
MO Bar No. 35218

3315 E. Ridgeview, Suite 1000
Springfield, MO 65804
(417) 887-2020
(417) 887-8431 Facsimile

**COUNSEL FOR ESTATE OF HERBERT W.
WILLIS BY ELAINE GILLEY, EXECUTOR**

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing instrument was served upon all attorneys of record by depositing same in the United States Mail, first class, postage prepaid, addressed to the following:

Mr. Jon R. Sanner and Mr. Jeffrey J. Brinker;
Mr. Robert D. Curran; and
Mr. Craig A. Smith.

The 26th day of January, 2005.

Kevin M. FitzGerald

CERTIFICATE OF VIRUS-FREE DISK

I, the undersigned, hereby certify pursuant to Rule 84.06(g) that the accompanying floppy disk has been scanned for viruses using Sophos anti-virus software this 26th day of January, 2005, and the software reports that the floppy disk is virus-free.

Kevin M. FitzGerald

RULE 84.06(C) CERTIFICATION

I, the undersigned, hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that a word count performed in Word Perfect 10.0 indicates a total word count of 3,490.

Kevin M. FitzGerald

TABLE OF CONTENTS – APPENDIX

First Amended Petition	A ₁
Second Amended Petition	A ₇
June 2, 2004, Court Order	A ₁₃
June 14, 2004, Correspondence of Attorney Curran	A ₁₄
M.R.C.P. 55.05	A ₂₀
M.R.C.P. 51.045	A ₂₁